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Hon. Henry T. Wingate
United States District Judge
Thad Cochran Federal Courthouse
501 East Court Street, Suite 6.750
Jackson, MS 39201

Via e-mail to wingate_chambers@mssd.uscourts.gov

Re: Jordan, et al. v. Cain et al., No. 3:15-cv-295-HTW-LGI
Response to Court's question on botched executions

Your Honor,

At the November 28, 2022 oral argument on the motion of Plaintiffs Richard Jordan and Ricky Chase and Intervenor Thomas E. Loden, Jr., the Court asked counsel for Plaintiffs to compile a list of botched executions in the United States in the last five years.¹

We understood the Court's question to relate to botched executions² using a three-drug protocol beginning with midazolam, and have responded accordingly.³ We are available to receive such other or clarifying directives as the Court may issue; however, because there were many more total executions in that period using a pentobarbital one-drug protocol (62) as compared with those using a midazolam three-drug protocol (20), broadening the inquiry will consume additional time. We believe the information below addresses the question posed by the Court.

¹ Given the exigent circumstances of the current litigation, we relied on the publicly available information cited below in addition to our previous research. Further information which may be relevant at a different stage of this litigation may supplement the materials collected here.

² This letter defines "botched executions" as including one of three characteristics: difficulty in securing IV access, problems with the execution drugs, or noticeable signs of struggle and pain by the condemned prisoner during the execution. In four of the incidents described below, the execution was halted. Other problems with the process of executions which fall outside these categories were not included; while these might be relevant at other stages of this litigation, they did not seem responsive to the Court's question.

³ Plaintiffs' Brief in Response to the Court's Order (Doc. 270) ("Ptfs' Br.") discussed some recent botched executions in one-drug jurisdictions: in Texas, the execution of Stephen Barbee on November 16, 2022 (Ptfs. Br. at 18), and in Arizona, the execution of Murray Hooper on November 16, 2022 (Ptfs. Br. at 18). Arizona had a botched execution earlier in 2022, when Clarence Dixon was subject to painful efforts to secure IV access for 25 minutes. Jimmy Jenkins Chelsea Curtis, *Arizona Executes Clarence Dixon for 1978 Murder of Deana Bowdin*, AZ Central, May 12, 2022,

<https://www.azcentral.com/story/news/local/arizona/2022/05/11/clarence-dixon-executed-arizona-deana-bowdoin-murder/9723223002/>.

Based on the above-stated research, we have compiled the following information for the Court regarding botched executions using a midazolam three-drug protocol from November 30, 2017 to the present:

A. ALABAMA

1. **February 22, 2018: Doyle Lee Hamm (IV access) (execution stopped).** Mr. Hamm suffered from advanced lymphatic cancer and carcinoma. For 2.5 hours, the execution team tried to find a vein, leaving Hamm with 10 to 12 puncture marks, including six in his groin and others that punctured his bladder and penetrated his femoral artery. Finally, approaching a midnight deadline that prohibited further attempts, the execution was stopped.⁴
2. **May 16, 2019: Michael Samra (signs of struggle/pain).** Mr. Samra's execution had been scheduled for 6 p.m. on May 16, but for unexplained reasons, it was delayed for more than an hour. "At 7:15 p.m.," a media witness later wrote for the Montgomery Advertiser, "his chest heaved three times in quick succession. After, his breathing appeared significantly labored, with his head slightly jerking with each breath for the next minute."⁵ A consciousness check was conducted at 7:17 p.m.; Samra did not appear to respond. But around 7:19 p.m., another reporter observed, "he stretched both hands and slightly raised his left arm, then curled his fingers and dropped his arm."⁶ Eventually he went still, and the curtain closed. Samra was declared dead at 7:33 p.m.
3. **July 28, 2022: Joe Nathan James, Jr. (IV access).** This execution was scheduled for 6:00 p.m., but was delayed for three hours. Prison officials asserted that the delay was a result of attempting to comply with the execution protocol without initiating a cut-down procedure and that "nothing out of the ordinary" had occurred during the delay. A private autopsy⁷ later contradicted ADOC's narrative. The autopsy findings, described by reporter Elizabeth Bruenig in *The Atlantic*, indicated that Mr. James "had suffered a long death. The state seems to have attempted to insert IV catheters into each of his hands just above the knuckles, resulting in broad smears of violet bruising. Then

⁴ Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture'*, NBC News, Feb. 25, 2018, <https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006>; Roger Cohen, *Death Penalty Madness in Alabama*, New York Times, Feb. 27, 2018, <https://www.nytimes.com/2018/02/27/opinion/death-penalty-alabama-doyle-lee-hamm.html>.

⁵ Melissa Brown, *Alabama executes Michael Brandon Samra in second lethal injection of 2019*, Montgomery Advertiser, May 16, 2019, <https://www.montgomeryadvertiser.com/story/news/crime/2019/05/16/alabama-execute-michael-brandon-samra-second-execution-2019/3692729002/>.

⁶ Ivana Hrynkiw, *Alabama executes Michael Samra, convicted of killing 4 in 1997*, AL.com, May 16, 2019, <https://www.al.com/news/birmingham/2019/05/michael-samra-convicted-of-killing-4-in-1997-to-be-executed-thursday.html>.

⁷ The three doctors conducting the private autopsy were Dr. Joel Zivot, a professor of anesthesiology at Emory University and an expert on lethal injection, independent pathologist Dr. Boris Datnow of Birmingham, and former Jefferson County Chief Deputy Coroner Jay Glass. Amy Yurkanin, *Joe Nathan James 'suffered a long death' in botched Alabama execution, magazine alleges*, AL.com, August 14, 2022, <https://www.al.com/news/2022/08/joe-nathan-james-suffered-a-long-death-in-botched-alabama-execution-magazine-alleges.html>.

it looked as though the execution team had tried again, forcing needles into each of his wrists, with the same bleeding beneath the skin and the same indigo mottling around the puncture wounds. On the inside of James's left arm, another puncture site, another pool of deep bruising, and then, a scant distance above, a strange, jagged incision, at James's inner elbow. The laceration met another cut at an obtuse angle. That longer, narrower slice was part of a parallel pair, which matched a fainter, shallower set of parallel cuts. Underneath the mutilated portion of James's arm was what appeared to be yet another puncture—a noticeable crimson pinprick in the center of a radiating blue-green bruise. Other, less clear marks littered his arm as well.”⁸ “I can't tell if local anesthetic was first infused into the skin, as slicing deep into the skin with a sharp surgical blade in an awake person without local anesthesia would be extremely painful,” Zivot [one of the doctors conducting the autopsy] explained. “In a medical setting, ultrasound has virtually eliminated the need for a cutdown,” Zivot said, “and the fact that a cutdown was utilized here is further evidence that the IV team was unqualified for the task in a most dramatic way.”⁹

4. **September 22, 2022: Alan Eugene Miller (IV access) (execution stopped).** Mr. Miller chose to be put to death with nitrogen hypoxia, which Alabama had authorized in 2018 as an alternative to lethal injection. When the night of the execution arrived, the State was not prepared to use that method, and so they decided to use lethal injection. That decision was approved by a 5-4 vote of the U.S. Supreme Court. The execution then began, but after failing to properly insert the catheter for some 90 minutes (while poking Mr. Miller with a needle approximately 18 times), Alabama Department of Corrections Commissioner John Hamm ordered the executioners to stop.¹⁰ On November 28, 2022, the State agreed that it would no longer attempt to execute Mr. Miller by lethal injection.¹¹
5. **November 17, 2022: Kenneth Eugene Smith (IV access) (execution stopped).** The execution began just after 10:00 p.m., but was called off at 11:21 p.m. when prison officials determined that they could not set a second IV line before the death warrant expired at midnight. ADOC's Commissioner said “the people attempting to carry out the execution had tried to insert a line into ‘several locations’ without success.”¹²

⁸ Elizabeth Bruenig, *Dead to Rights*, The Atlantic, August 14, 2022, <https://www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/>;

⁹ *Id.*

¹⁰ Kim Bellware & Derek Hawkins, *Execution Halted at Last Minute when Ala. Prison Staff Can't Find a Vein*, Washington Post, September 23, 2022, <https://www.washingtonpost.com/nation/2022/09/23/alan-miller-execution/>; Death Penalty Information Center, *Alan Miller Asks Federal Court to Bar Alabama from Second Attempt to Execute Him by Lethal Injection*, <https://deathpenaltyinfo.org/news/alan-miller-asks-federal-court-to-bar-alabama-from-second-attempt-to-execute-him-by-lethal-injection>.

¹¹ *Miller v. Hamm*, 2:22-cv-00506-RAH (M.D. Ala.) Doc. 124.

¹² Ivana Hryniw, *Alabama Inmate Describes Failed Execution Attempt: Unknown Injections, Repeated Attempts to Start IV*, AL.com, Nov. 28, 2022, <https://www.al.com/news/2022/11/alabama-inmate-describes-failed-execution-attempt-unknown-injections-repeated-attempts-to-start-iv.html>. As discussed in Ptf's Br. (Doc. 270) at 19-20, Alabama Governor Ivey “ordered a halt to executions in the state” after the attempt to execute Mr. Smith.

B. TENNESSEE

6. **August 9, 2018: Billy Ray Irick (signs of struggle/pain).** Witnesses to the execution described Mr. Irick choking, moving his head, and moving his forearms against the restraints after the chemical paralytic (second drug) was administered.¹³ Based on these accounts, anesthesiologist Dr. David Lubarsky opined that Mr. Irick was “aware and sensate during his execution and would have experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride.”¹⁴
7. **May 16, 2019: Don Johnson (signs of struggle/pain).** Witnesses to the execution described Mr. Johnson’s labored breathing as “snoring,” “slurping,” or “gasping,” counting 33 of such noises before the “consciousness check” and 28 after. “There was quite a bit of noise coming from Don Johnson lasting for quite a bit of time.”¹⁵
8. **April 21, 2022: Oscar Franklin Smith (drug preparation) (execution stopped).** The evening of the scheduled execution, Governor Bill Lee announced, “due to an oversight in preparation for lethal injection, the scheduled execution of Oscar Smith will not move forward tonight. I am granting a temporary reprieve while we address Tennessee Department of Correction protocol.”¹⁶ Public records obtained by reporters from the Tennessee Department of Corrections the next month indicated that the execution team had failed to test two of the three drugs (midazolam and potassium chloride) set aside for use as the first and third drugs in the protocol for endotoxins, a type of chemical contaminant.¹⁷

¹³ Natalie Allen and Dave Boucher, *What happened in and outside Riverbend prison as Billy Ray Irick was put to death*, The Tennessean, August 10, 2018, <https://www.tennessean.com/story/news/2018/08/10/billy-ray-irick-execution-riverbend-prison/954201002/>; Steven Hale, *The Execution of Billy Ray Irick*, Nashville Scene, August 10, 2018, https://www.nashvillescene.com/news/pithinthewind/the-execution-of-billy-ray-irick/article_ef6c718d-bc1c-550f-926c-e68eb7fd9891.html.

¹⁴ Steven Hale, *Medical Expert: Billy Ray Irick Was Tortured During Execution*, Nashville Scene, Sept. 7, 2018, https://www.nashvillescene.com/news/pithinthewind/medical-expert-billy-ray-irick-was-tortured-during-execution/article_1c31a651-5ffc-5be2-a39e-6a35f41c5558.html.

¹⁵ Liliana Segura, *One Night, Two Executions, and More Questions About Torture*, The Intercept, May 25, 2019, <https://theintercept.com/2019/05/25/executions-tennessee-alabama-midazolam/>; WLTV, *Tennessee man Don Johnson executed*, Facebook Live, May 16, 2019 (video of witness statements after execution) https://m.facebook.com/WVLT8/videos/334343970611202/?_rdr; Adam Tamburin, Yihyun Jeong, Mariah Timms, and Katherine Burgess, *Tennessee executes Donnie Edward Johnson by lethal injection*, The Tennessean, May 16, 2019, <https://www.tennessean.com/story/news/crime/2019/05/16/execution-donnie-johnson-tennessee-leathl-injection/3668943002/>.

¹⁶ Associated Press, *Tennessee governor calls off execution of Oscar Smith, citing oversight in plan*, NBC News, April 22, 2022, <https://www.nbcnews.com/news/us-news/tennessee-governor-calls-execution-oscar-smith-citing-oversight-plan-rcna25527>

¹⁷ Jason Lamb, *New documents shed light on delayed Oscar Smith execution*, News Channel 5 Nashville, May 13, 2022, <https://www.newschannel5.com/news/new-documents-shed-light-on-delayed-oscar-smith-execution>.

C. OHIO

9. **July 18, 2018: Robert Van Hook (signs of struggle/pain).** As summarized in a long-form NPR report, Mr. Van Hook wheezed and gasped for air as he was executed on July 18, 2018, with a three-drug cocktail beginning with midazolam. The day after the execution, Emory University anatomical pathologist Dr. Mark Edgar performed an autopsy on the body at the county coroner's office in Dayton. "Bloody froth fills both main stem bronchi," he wrote in his report, referring to the two large airways that enter each lung. He also found "frothy fluid" deeper inside the lungs, which were heavier than usual. Dr. Edgar later testified in federal court that, based on his examination of Van Hook's body, inmates executed using midazolam "would experience severe respiratory distress with associated sensations of drowning, asphyxiation, panic and terror."¹⁸ The expert testimony regarding the execution of Mr. Van Hook and others caused Ohio Gov. Mike DeWine to delay upcoming executions and to instruct the Department of Rehabilitation and Corrections to reassess the state's lethal injection protocol.¹⁹ To date, Ohio has not returned to the midazolam three-drug protocol.

D. OKLAHOMA

10. **October 28, 2021: John Marion Grant (signs of struggle/pain).** After the first drug (midazolam) was administered, Mr. Grant convulsed and vomited for several minutes, leading members of the execution team to wipe the vomit from his face and neck. Associated Press media witness Sean Murphy said that "Grant's body shook and jerked nearly two dozen times before vomit spurted from his mouth and spilled down his neck."²⁰

Thus, out of the twenty-four (24) attempted midazolam three-drug executions over the past five years, ten (42%) included botches in the categories set forth in footnote 2 above.

Regards,

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¹⁸ Noah Caldwell, Ailsa Chang, and Jolie Myers, *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, NPR, September 21, 2020, <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection>.

¹⁹ Office of Mike DeWine, Governor of Ohio, *Governor DeWine Delays Execution of Warren Henness in Response to Federal Court Order*, January 25, 2019, <https://governor.ohio.gov/media/news-and-media/012519>

²⁰ Jaclyn Peiser and Christine Armario, *Oklahoma Death Row Inmate Convulsed, Vomited During Lethal Injection, Witness Says, As State Resumes Executions*, Washington Post, Oct. 29, 2021, <https://www.washingtonpost.com/nation/2021/10/29/john-marion-grant-oklahoma-execution/>; Adam Liptak, *After Supreme Court Lifts Stay, Oklahoma Executes Inmate*, New York Times, Oct. 28, 2021, <https://www.nytimes.com/2021/10/28/us/politics/supreme-court-oklahoma-executions.html>.